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U.S. DIST. ...
DISTRICT OF ...

UNITED STATES DISTRICT COURT OF MASSACHUSETTS

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**GET IN SHAPE FRANCHISE, INC.**

**Plaintiff,**

**C.A. NO. 1:15-CV-12997RWZ**

**v.**

**TFL FISHERS, LLC; ROSALYN R. HARRIS,**

**THINNER FOR LIFE, INC. and FIT CHICKS, LLC**

**Defendants**

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**DEFENDANTS' MOTION TO DISMISS FOR IMPROPER VENUE**

Now comes the Defendant, Pro-Se, and respectfully submits this motion to dismiss the Complaint for the following reason:

**Venue is not proper in this district**

The Defendant previously included in its Answer to Complaint a defense that this honorable Court does not have jurisdiction but the Defendant desires to address this issue here in a separate motion and include additional facts supporting her case.

Under 28 U.S.C. 1391, a civil action such as this action may be brought only in (1) a judicial district where any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

In addition, U.S. Code 1332 states that, (a)The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between— (1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;
(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States. (b)Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

The Complaint should be dismissed for improper venue because:

1. The claim is unlikely to exceed $75,000 (before considering counterclaims). Using the most conservative assumption and assuming an outcome most favorable to the Plaintiff, GISFW is entitled to the 6% royalty on the remainder of the franchise term, based on recent historical sales performance. From June 2015 there are almost eight years remaining on the franchise term. The last six months sales were $40,681 (See Exhibit 1). Multiplied by 16 to get the equivalent of 8 years of sales would be $650,896. This figure multiplied by a 6% royalty rate would be $39,054. Then, this franchisor profit would have to be reduced by franchisor's costs in servicing the studio. At the Plaintiff's 45% net income margin the estimated lost future profit would be $17,054. This franchisor profit estimate would then have to be discounted to present value, so the maximum claim would be less than $17,054 even if the Plaintiff were unable to mitigate its loss over the following eight years.

   While the Defendant asserts that the Franchise Agreement should be declared null and void due to multiple illegal fees and violations of Federal and Indiana state franchise law, this calculation is made to demonstrate the maximum claim is likely to be far less than $75,000. The Plaintiff's Complaint establishes no facts to demonstrate that the Claim is likely to exceed $75,000.

2. The Plaintiff's multiple violations of Indiana Deceptive Franchise Practices Act can most properly be adjudicated in the State of Indiana. The Defendant views these violations as one of the reasons that the Franchise Agreement should be deemed null and void prior to the point in time when the Plaintiff asserts a violation of the Franchise Agreement terms by the Defendant.

3. The Defendant works full time, her taxable income is estimated at $45,000 in 2014 and was $36,000 in 2013. She has less than $2,000 in her sole bank account (See Exhibit 2) and owns no substantial assets such as a home or expensive car that could be sold to raise funds. The 2014 tax return has not been filed yet but a copy can be provided upon request when it is finalized. All of the Defendants limited resources are required to maintain her modest living. As such, the Defendant simply does not have the money to fly to Massachusetts and pay for the hotel and other expenses associated with defending this case and pursuing the counterclaims. Nor can she afford to take the time off work that these trips would require. Nor can the Defendant afford Counsel.

For these reasons this case should be moved to the proper state court in Indiana. Not doing so would provide the Plaintiff and counter defendant de facto immunity from its illegal activities and an automatic victory in its claims that the Defendant maintains are meritless and deserve a fair hearing. The Plaintiff's income of well over $1 million per year in addition to its GISFW company value which goodwill "exceeds millions of dollars" per the Plaintiff (See Complaint paragraph 14) and other substantial assets provide more than ample resources to pursue this claim in Indiana.

4. The Defendant does not reside in Massachusetts. She in fact resides in the state of Indiana and her GISFW franchise was solely in the State of Indiana. No substantial part of the events or omissions giving rise to the claim occurred in the State of Massachusetts. The Defendant signed the Franchise Agreement in Indiana and only spent four days in "franchise school" and 1.5 days in a quarterly meeting in 2013 in Mass. Other than these 5.5 days, the entirety of the Defendant's business was in the State of Indiana and all GISFW charges were made by direct debit out of the Defendants bank account in the State of Indiana.

5. The Defendant has not violated any GISFW trademarks, as detailed in her Memorandum in Support of Defendant's Motion to Dismiss and in Opposition to Plaintiff's Motion for Preliminary Injunction. Moreover, per the Patent and Trademark office these trademarks are not owned by GISFW. They are owned by Brian Cook.

6. While irrelevant to the Motion to Dismiss for improper venue, the Plaintiff makes claims about the illegal fees it charged that merit some response. For example, the Plaintiff claims that the $75 per Month IT fee is allowable because the Franchise

Disclosure Document (FDD) sets forth a maximum fee of $100 per month. Disregarding the fact that the Franchise Agreement is the signed and legally governing contract and not the FDD, the Defendant was charged two IT fees of $75 each, totaling $150 per month, well in excess of $100 per month. Furthermore, the Defendant was never provided invoices for these amounts and believes the out of pocket costs for the "legacy IT fee" of $75 per month are much less than $75. The Plaintiff cannot charge fees for out of pocket costs for which it incurs no costs.

Likewise, the Plaintiff claims that the maximum charge for the annual conference is $2,000 per year per the FDD. While true, the document also states that the Plaintiff can only charge for "speaker's, meals and activities" (See Exhibit 3). The Defendant believes the Plaintiffs total aggregate charge of $95,000 is well in excess of actual speaker, meals and activities costs.

7. Likewise, the Plaintiff asserts that the training fees such as the under $20k training fee (for which it charged these struggling franchisees an unreasonable rate of $3,400 per hour in the aggregate) were proper because the Franchise Agreement gives the Plaintiff the right to charge for additional training. However, this training must take place at the Franchisor's location or the studio location (See Exhibit 4), and must be "reasonable" in amount. These under $20k "webinars" did not comply with these requirements and thus the fees charged for these webinars are not permissible per the Franchise Agreement.

8. The plaintiff states that the "retention of the client list, names, data and intellectual property for the financial and business benefit of Fit Chicks constitutes a prime facie showing of unjust enrichment." However, Fit Chicks assumed the prepaid customer contracts and is providing services associated with these contracts at no charge (because the contracts were already prepaid). Therefore, there is no "unjust enrichment". The "customer list" was an assumed liability, not an asset purchased.

9. The Plaintiff states that the Defendant, Ms. Harris "personally admitted that she is the owner and operator of Fit Chicks." This was never admitted, is simply not the case and is easily refutable.

## CONCLUSION

For the foregoing reasons, the Defendant prays that this Court:

**Grant the Defendant's Motion to Dismiss for improper venue**

Respectfully Submitted,

Rosalyn Harris
9726 Ambleside Drive, apt#302
Fishers, IN 46038
Tel 317-361-9200

CERTIFICATE OF SERVICE

I, Rosalyn Harris, certify that on this 2nd day of September, 2015, I mailed a copy by U.S. mail of the foregoing to Lee Harrington of Nixon Peabody, 100 Summer Street. Boston, Ma. 02110 and to Sarah Carlin at Get In Shape Franchise, Inc., 75 2nd Avenue, Suite 220, Needham, Ma. 02494

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